Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

In the Matter of
JOHN DOE and ROE CORPORATION,

Petitioners,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Superior Court of New Jersey Appellate Division

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the investigatory powers granted to the Attorney General of the State of New Jersey pursuant to N.J.S.A. 2C:41-5 of the New Jersey Racketeer Influenced and Corrupt Organizations Act ("RICO"), N.J.S.A. 2C:41-1, *et seq.*, constitute an unconstitutional circumvention of the protective, intervening presence of the grand jury guaranteed every person by the Fifth Amendment of the United States Constitution.

2. Whether the Attorney General's use of N.J.S.A. 2C:41-5 to propound Investigative Interrogatories upon John Doe and Roe Corporation, the targets of a RICO investigation, (hereinafter "Doe" and "Roe", or collectively "Petitioners"), violated Doe's and Roe's right to a zone of privacy free from unreasonable governmental intrusion as guaranteed by the Fourth, Fifth, and Ninth Amendments of the United States Constitution.

PARTIES TO THE PROCEEDING

John Doe

Roe Corporation

Attorney General of the State of New Jersey

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CITATIONS OF OPINIONS AND ORDERS ENTERED IN THE CASE

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STATEMENT OF JURISDICTION

This Court has jurisdiction to review the Appellate Division and trial court decisions rendered in this case as they involve federal questions arising under the Fourth, Fifth, Ninth, and Fourteenth Amendments of the United States Constitution. The statute in issue, N.J.S.A. 2C:41-5, has been construed by the Attorney General of the State of New Jersey (hereinafter "Attorney General") and the Superior Court of New Jersey, Law and Appellate Divisions, as permitting the Attorney General to propound Investigative Interrogatories upon the targets of a New Jersey RICO investigation requiring the targets to produce all of their corporate records from the corporation's date of incorporation, some 18 years prior to production, and requiring the individual and corporate target to answer voluminous interrogatory questions, for the purpose of acquiring information, much of which the Attorney General already had, to be used against them. This Court has jurisdiction because the statute itself and the Attorney General's use of the statute violated the Petitioners United States Constitutional rights to privacy, to the protection of the grand jury, to be free from self-incrimination, and to be free from unreasonable searches and seizures.

It is respectfully submitted that this Court should exercise its jurisdiction and consider this matter on its merits because N.J.S.A. 2C:41-5 has both federal and numerous state analogues which undoubtedly are currently being utilized in much the

same fashion as demonstrated in this case. *See* 18 U.S.C. § 1961, *et seq.*; Ariz. Rev. State. Ann. 13-2301, *et seq.*; Cal. Penal Code 186, *et seq.*; Colo. Rev. Stat. Ann. 18-17-101, *et seq.*; Conn. Gen. Stat. Ann. 53-393, *et seq.*; Del. Code Ann. Tit. 11, 1501, *et seq.*; Fla. Stat. Ann. 895.01, *et seq.*; Ga. Code. Ann. 16-14-1, *et seq.*; Haw. Rev. Stat., 842-1, *et seq.*; Idaho Code 18-7801, *et seq.*; Ill. Rev. Stat. ch. 56½, 1651, *et seq.*; Ind. Code Ann. 35-45-6-1, *et seq.*; La. Rev. Stat. Ann. 15:1351-56; Miss. Code Ann. 97-43-1, *et seq.*; Nev. Rev. Stat. Ann. 207.350, *et seq.*; N.J.S.A. 2C:41-1, *et seq.*; N.M. Stat. Ann., 30-42-1, *et seq.*; N.Y. Penal Law 460.00, *et seq.*; N.C. Gen. Stat. 75-D-1, *et seq.*; N.D. Cent. Code 12.1-06.1-01, *et seq.*; Ohio Rev. Code Ann. 2923.31, *et seq.*; Okla. Stat. Ann. Tit. 22 1401, *et seq.*; Or. Rev. Stat. 166.715, *et seq.*; Pa. Cons. Stat. Ann. tit. 18,911; R.I. Gen. Laws 7-15-1, *et seq.*; Tenn. Code Ann. 39-12-201, *et seq.*; Utah Code Ann. 76-10-1601, *et seq.*; Wash. Rev. Code Ann. 9A.82.010, *et seq.*; Wis. Stat. Ann 946.80, *et seq.* The issues presented in this petition are relevant not only to the application of N.J.S.A. 2C:41-5, but also to the many RICO-type statutory schemes that have been enacted throughout this country.

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

AMENDMENT IV

SEARCHES AND SEIZURE

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE; JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT IX

CONSTRUCTION OF ENUMERATED RIGHTS

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT XIV

CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New Jersey Statutes Annotated — N.J.S.A. 2C:41-5 Investigative Interrogatories

a. Whenever the Attorney General determines that there exists a reasonable suspicion that any person or enterprise may have information or be in possession, custody, or control of any documentary materials relevant to an investigation under this chapter, or whenever the Attorney General belies it to be in the public interest that an investigation be made pursuant to this chapter, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon the person, an investigative interrogatory requiring him to answer and produce material for examination.

b. Each interrogatory shall:

(1) State the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable thereto;

(2) Advise the person that he has the right to discuss the interrogatory with legal counsel prior to returning it to the Attorney General or prior to making material available as provided hereinafter to subsection f. and that he has the right to file in Superior Court a petition to modify or set aside the interrogatory pursuant to subsection j. hereinafter;

(3) Describe the class or classes of documentary material to be produced thereunder with such specificity and certainty as to permit the material to be fairly identified;

(4) Prescribe a return date which will provide a reasonable period of time within which answers may be made and material so demanded may be assembled and made available for inspection and copying or reproduction as provided hereinafter in subsection f.

c. No interrogatory shall:

(1) Contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued in aid of a grand jury investigation; or

(2) Require the production of any documentary evidence which would be otherwise

privileged from disclosure if demanded by a subpena duces tecum issued in aid of a grand jury investigation.

d. Service of any interrogatory filed under this section may be made upon a person by:

(1) Delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of the person, or upon any individual person; or

(2) Delivering a duly executed copy thereof to the principal place of business of the person to be served; or

(3) Depositing a copy in the United States mail, by registered or certified mail duly addressed to the person at his principal office or place of business.

e. A verified return by the individual serving any interrogatory, setting forth the manner of service shall be prima facie proof of service. In the case of service by registered or certified mail, the return shall be accompanied by the return post office receipt of delivery of the interrogatory.

f. Any person upon whom any interrogatory issued under this section has been duly served which requires the production of materials shall make the material available for inspection and copying or reproduction to the Attorney General at the principal

place of business of that person in the State of New Jersey or at such other place as the Attorney General and the person thereafter may agree and prescribe in writing. Upon written agreement between the person and the Attorney General, copies may be substituted for all or any part of the original material. The Attorney General may cause the preparation of any copies of documentary material as may be required for official use by the Attorney General.

No matter produced pursuant to this section shall be available for examination, without the consent of the person who produced the material, by an individual other than the Attorney General in connection with the enforcement of this act. Under reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in his possession shall be available for examination by the person who produced the material or any duly authorized representatives of the person.

In any case or proceeding involving any alleged violation of this chapter, the Attorney General may present before any court or Grand Jury, any such documentary material in his possession pursuant to this section subject to any protective order deemed proper by the Superior Court.

Any person who shall disclose to any person other than the Attorney General or a person retained by the Attorney General as set forth above, the name of any person who receives an investigative interrogatory or any information obtained pursuant thereto, except in proceedings involving an alleged violation of this chapter and except as so directed

by the Attorney General shall be guilty of a crime of the fourth degree.

g. Upon completion of:

(1) The review and investigation for which any documentary material was produced under this section, and

(2) Any case or proceeding arising from the investigation, the Attorney General shall return to the person who produced the material all the material other than copies thereof made by the Attorney General pursuant to this section which has not passed into the control of any court or grand jury through the introduction thereof into the record of the case or proceeding.

h. When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no case or proceeding arising therefrom has been instituted within 2 years after completion of the examination and analysis of all evidence assembled in the course of the investigation, the person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this section so produced by the person.

i. Whenever any person fails to comply with any investigative interrogatory duly served upon him under this section or whenever satisfactory copying or reproduction of any material cannot be done and the person refuses to surrender the material, the

Attorney General may file in the Superior Court a petition for an order of the court for the enforcement of this section.

j. At any time before the return date specified in the interrogatory, such person may file in the Superior Court a petition for an order modifying or setting aside the interrogatory. The time allowed for compliance of the interrogatory, in whole or in part as deemed proper and ordered by the court, shall not run during the pendency of such petition in the court. The petition shall specify each ground upon which the petition relies in seeking relief, and may be based upon any failure of the interrogatory to comply with the provisions of this section or upon any constitutional or other legal right or privilege of the petitioner. In such proceeding the Attorney General shall establish the existence of any investigation pursuant to this chapter and the nature and subject matter of the investigation.

L. 1981, c. 167, § 2, eff. June 15, 1981. N.J.S.A. 2C:41-5

STATEMENT OF THE CASE

Pursuant to N.J.S.A. 2C:41-5 the Attorney General served two identical sets of Investigative Interrogatories upon John Doe and Roe Corporation, containing 291 questions and a document demand requiring the production of all of Roe Corporation's records from its inception, in 1978, to the present. Pursuant to N.J.S.A. 2C:41-5j the Petitioners filed a petition to modify or set aside the Investigative Interrogatories asserting, among other things, that the Interrogatories violated Petitioners' Fourth and Fifth Amendment rights to a zone of privacy free from unwarranted governmental intrusion and to be free from

compelled self-incrimination. (October 27, 1995 sealed transcript, excerpted portions of which are included in Petitioners' Appendix C, pp. 31a-50a). Petitioners argued also that the power given to the Attorney General to propound Investigative Interrogatories under the statute as drafted violated the separation of powers doctrine by permitting the Attorney General to act as both prosecutor and grand jury, thereby depriving the Petitioners of the protection of the grand jury. *Id.* (pp. 6a-9a).

The trial court likened the investigatory powers of N.J.S.A. 2C:41-5 to the powers allowed government agencies to propound administrative subpoenas. (pp. 8a-9a). This Court has narrowly defined the permissible scope of an administrative subpoena. *See United States v. Powell*, 379 U.S. 48, 85 S. Ct. 248, 13 L. Ed. 2d 112 (1964); *United States v. Morton Salt Co.*, 338 U.S. 632, 70 S. Ct. 357, 94 L. Ed. 401 (1950); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 66 S. Ct. 494, 90 L. Ed. 614 (1946). For an administrative subpoena not to be violative of the Fourth and Fifth Amendments it must seek information relevant to a lawfully conducted investigation and be specific in directive and limited in scope. When an administrative subpoena is challenged, the investigating agency must show:

> [1] that the investigation will be conducted pursuant to a legitimate purpose, [2] that the inquiry may be relevant to that purpose, [3] that the information sought is not already within the [investigating agency's] possession, and [4] that the administrative steps required by the [enabling legislation] have been followed. . . .

Powell, supra, 379 U.S. 48, 57-58, 85 S. Ct. 248, 255.

Pursuant to N.J.S.A. 2C:41-5j, once a petition to modify or set aside is filed, the Attorney General must "establish the existence of an investigation pursuant to this chapter and the nature and subject matter of the investigation." The Petitioners argued that the Attorney General should be made to produce this information (pp. 110a-116a). Significantly, the Attorney General acknowledged her obligation to come forward with this information, but argued that she should be permitted to do so by filing an *ex parte* affidavit for an *in camera* review by the Court. (pp. 104a-106a).

Notwithstanding the Petitioners' argument, the Attorney General's acknowledgment, and the express dictates of the statute, the court never required the Attorney General to come forward with information regarding the existence, nature, and subject matter of the investigation. Rather, on January 31, 1996 the court issued an Opinion adjudging N.J.S.A. 2C:41-5 and the Attorney General's investigation conducted thereunder not violative of Petitioner's Fourth, Fifth and Fourteenth Amendment rights. The court then scheduled additional hearings to consider whether the Investigative Interrogatories were overbroad or unduly burdensome, *i.e.* whether they were relevant to the stated purpose of the investigation, limited in scope, and specific in directive. At these hearings, the court still did not require the State to establish the existence, nature and subject matter of the investigation, but rather merely considered the relevance, scope, and specificity of each Interrogatory against the stated nature of conduct under investigation, (*i.e.*, the alleged control and financing of John Doe and Roe Corporation by organized crime), which was cryptically specified on the Interrogatory cover sheet pursuant to the explanatory prerequisite of N.J.S.A. 2C:41-5b(1).

Throughout these proceedings, the only reason given by the State to justify the Interrogatories was that the State was in

possession of information to indicate that Roe Corporation is a "mob company". This was the only explanation ever given by the State to purportedly establish the existence, nature, and subject matter of the investigation as required by N.J.S.A. 2C:41-5.

The court apparently accepted the Attorney General's characterization of Roe Corporation as a "mob company" as sufficient explanation of the nature and subject matter of the investigation. Although the court purported to evaluate the relevance, scope, and specificity of each Interrogatory it could not possibly have conducted any real assessment of relevance, scope, and specificity as it repeatedly accepted as sufficient the Attorney General's assertion that: (1) the questions asked and documents demanded were necessary to determine if the State's undisclosed information was accurate; and (2) that there really was no way to justify the relevance of any particular request until after the information was received. (*See* February 23, 1996 sealed transcript, excerpted portions of which are included in Petitioner's Appendix D at pp. 51a-54a). On March 26, 1996, the Court ordered the Petitioners to answer the Interrogatories, as partially modified by the Court, and to make all of Roe's corporate and financial records (from 1978 to the present) available for inspection. (pp. 55a-57a).

The Petitioners appealed the trial court determinations, arguing, among other things, that the Investigative Interrogatories violated their right to enjoy a zone of privacy free from unreasonable governmental intrusion as guaranteed by the Fourth, Fifth, Ninth, and Fourteenth Amendments of the United States Constitution. (Petitioners' Appellate Brief [hereinafter "PAB"] Point IB. at pp. 71a-75a). The Petitioners argued that the trial court's failure to require the Attorney General to establish the existence, nature, and subject matter of the investigation prevented the Court from protecting the

Petitioners' constitutional rights. (Petitioners' Reply Appellate Brief [hereinafter "PRB"] pp. 4a-5a at pp. 102a-105a). Petitioners further argued that N.J.S.A. 2C:41-5 violated their right to the protective, intervening presence of the grand jury. (PAB Point III at pp. 75a-78a). In addition, the Petitioners asserted that the Investigative Interrogatories were used improperly as information uncovered in post-judgment motions (*i.e.*, after the issuance of the March 26, 1996 Order Compelling Compliance with the Investigative Interrogatories) revealed that much of the information purportedly sought by the Attorney General was already in her possession. (pp. 79a-83a). This information revealed a violation of *Powell, supra,* 379 U.S. 48, 57-58, 85 S. Ct. 248, 255.

The Appellate Division affirmed the trial court decisions in all respects and determined that the Petitioners' contention that they were the targets of a criminal investigation obviated the need for the Attorney General to establish the existence, nature, and subject matter of the investigation. (p. 29a). The Appellate Court wholly failed to address the Petitioners' argument regarding the impropriety of the Attorney General's demanding information from the Petitioners that was already within her possession.

John Doe and Roe Corporation then petitioned the New Jersey Supreme Court for certification of their appeal. They asserted, among other things, that the Trial and Appellate Court's failure to require the Attorney General to establish the existence, nature, and subject matter of the investigation violated the Petitioners' Fourth, Fifth, and Ninth Amendment rights and prevented these courts from assuring that the investigation was in compliance with the dictates of N.J.S.A. 2C:41-5 and *United States v. Powell*, 379 U.S. 48, 85 S. Ct. 248, 13 L. Ed. 2d 112 (1964). (Petitioners' Supreme Court Brief [hereinafter "PSB"] Point I at pp. 96a-101a). On September 16, 1997 the New

Jersey Supreme Court denied John Doe's and Roe Corporation's petition for certification. (p. 103a).

For the following reasons, John Doe and Roe Corporation now respectfully petition this Court to issue a writ of certiorari to the Appellate Division of the Superior Court of New Jersey.

REASONS FOR GRANTING THE WRIT

I.

N.J.S.A. 2C:41-5 UNCONSTITUTIONALLY EMPOWERS THE ATTORNEY GENERAL TO ISSUE GRAND JURY SUBPOENAS FREE OF THE INTERVENING PRESENCE OF THE GRAND JURY.

The Fifth Amendment of the United States Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . .

It is axiomatic that the grand jury must not be captive to any of the three branches of government. The right to be held for a crime only upon indictment or presentment of a grand jury predates our constitution. *See United States v. Dionisio*, 410 U.S. 1, 93 S. Ct. 764, 35 L. Ed. 2d 67 (1973). The Fifth Amendment acknowledged the right to a grand jury but did not relegate it to a position within any of the three branches of government. The right for a civilian only to be held for a crime on the presentment or indictment of a grand jury presupposes that the grand jury will act as an unbiased investigator independent of the prosecutor or the judge. *See id.*

The grand jury serves as a protective body of peers with no axes to grind or agency to serve, to stand as a buffer between the oppressive power of the State and the individual. *See id.* at 28, 93 S. Ct. at 764. It "is the only accusatorial body of the federal government recognized by the constitution." *Id.*; *see also Hale v. Henkel*, 201 U.S. 43, 59, 26 S. Ct. 370, 373, 50 L. Ed. 652 (1906) ("The most valuable function of the grand jury [is] to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will.").

Traditionally, and subject to constitutional limitations, the grand jury alone possessed the power to subpoena and interrogate witnesses and to require the production of documents. Implicit in this power is the duty not to investigate, interrogate, or subpoena when the grand jury finds there to be an insufficient basis on which to believe that a crime has been committed.

The authority given to the State of New Jersey Attorney General to conduct investigations under N.J.S.A. 2C:41-5 of persons reasonably suspected of having information pertinent to an investigation violates a citizen's inalienable right to the protection of the grand jury. That the evidence acquired by the Attorney General's Office would ultimately have to be presented to a grand jury for indictment does not change this fact.

There is a significant difference between a grand jury proceeding and an N.J.S.A. 2C:41-5 investigation. With a grand jury present, the prosecutor must compile and present evidence to the grand jury for its consideration and the grand jury determines whether or not to subpoena witnesses. In the instant matter, the prosecutor, *i.e.* the Attorney General, issued a subpoena commanding the Petitioners to appear and give testimony to the State, and to turn over corporate records in

which John Doe had a possessory and a participatory interest for the State to inspect to try to build a case against the Petitioners. Practically speaking, N.J.S.A. 2C:41-5 gives the State unbridled authority to conduct unrestricted investigations into a target's affairs free of the intervening presence of the grand jury. As evidenced by the manner in which the New Jersey Courts reviewed this matter, N.J.S.A. 2C:41-5 permits the State to conduct investigations in such a manner as to make the grand jury's constitutionally designated role worthless.

Moreover, as construed by the Attorney General in the instant matter, N.J.S.A. 2C:41-5 enables the Attorney General to exploit the citizen's respect for the State by serving Investigative Interrogatories with the imprimatur of the Attorney General, commanding appearance at the Attorney General's Office with the information requested, merely on the Attorney General's suspicion that the witness possesses some information that might be useful to an investigation that the Attorney General purports to be conducting, or whenever the Attorney General believes it to be in the public interest that an investigation be made. *See* N.J.S.A. 2C:41-5. Many citizens will no doubt comply (as recognized by the New Jersey Trial Court) without ever challenging the infringement of their rights. (p. 48a). However, as in the instant matter, even where the validity of the investigation is challenged, the State can claim that its investigation is based upon information provided by an informant and that its investigation and the welfare of the informant will be jeopardized by disclosing the information. (pp. 104a-106a). Of course, were the prosecuting arm of the State required to conduct the investigation subject to the intervening presence of the grand jury, at least twenty-three individuals, unbiased and independent from the State, would first have to evaluate this information for its veracity and relevance. *Cf. State v. Hilltop Private Nursing Home Inc.*, 177 N.J. Super. 377, 426 A.2d 1041 (App. Div. 1981) (prosecutor

does not have the power to subpoena an individual to appear before the prosecutor's office and cannot prevent the witness from presenting the subpoenaed materials directly to the grand jury instead of the prosecutor).

N.J.S.A. 2C:41-5 effectually denies a citizen this right.

II.

THE NEW JERSEY COURTS' FAILURE TO REQUIRE THE ATTORNEY GENERAL TO ESTABLISH THE EXISTENCE, NATURE, AND SUBJECT MATTER OF THE INVESTIGATION SANCTIONED THE ATTORNEY GENERAL'S VIOLATION OF THE PETITIONERS' FOURTH, FIFTH AND FOURTEENTH AMENDMENT RIGHTS.

Undoubtedly cognizant of the dangers inherent in N.J.S.A. 2C:41-5 the New Jersey Legislature attempted to build safeguards into the statute which, as evidenced by the instant investigation, are wholly illusory. Pursuant to N.J.S.A. 2C:41-5j, the recipient of an Investigative Interrogatory may: "[a]t any time before the return date specified in the interrogatory. . .file in the Superior Court a petition for an order modifying or setting aside the interrogatory." Once a petition to modify or set aside an interrogatory is filed, the Attorney General must "establish the existence of an investigation pursuant to this chapter and the nature and subject matter of the investigation." *Id.*

As in the case of an administrative subpoena, for an Investigative Interrogatory not to be violative of the Fourth and Fifth Amendments, it must be issued for a lawfully authorized purpose and the documents requested must be relevant to the inquiry and adequately specified. *See United States v. Powell, supra*, 379 U.S. 48, 85 S. Ct. 248; *United States v.*

Morton Salt Co., supra, 338 U.S. 632, 70 S. Ct. 357; *Oklahoma Press Publishing Co. v. Walling, supra*, 327 U.S. 186, 66 S. Ct. 494. This Court has long held that an administrative subpoena must be narrowly tailored to obtaining information relevant to a lawfully authorized purpose. A subpoena which is too broad or indefinite will fail to pass constitutional muster. *See Oklahoma Press, supra*, 327 U.S. at 207-208, 66 S. Ct. at 504-505.

In *Oklahoma Press*, this Court cited several cases to illuminate the type of subpoena that would be deemed too broad or indefinite to pass constitutional muster. For example, in *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 44 S. Ct. 336, 337, 68 L. Ed. 696 (1924), this Court adjudged the Federal Trade Commission's inquiry into the business records of American Tobacco Company violative of the Fourth and Fifth Amendments because the FTC claimed "an unlimited right of access to the respondent's papers with reference to the possible existence of practices in violation of [the statute]." *Id.* at 305, 44 S. Ct. at 337. Writing for the majority, Justice Holmes stressed: "It is contrary to the first principles of justice to allow a search through all the respondent's records, relevant or irrelevant, in the hope that something will turn up." *Id.* at 306, 44 S. Ct. at 337. Justice Holmes further stated that the mere fact of carrying on interstate commerce and of "being organized as a corporation do not make men's affairs public. . .". *Id.* at 305.

In *Wheeler v. United States*, 226 U.S. 478, 33 S. Ct. 158, 57 L. Ed. 309 (1912), a subpoena was no doubt deemed reasonable because of its limited duration, calling for "copies of all letters and telegrams, all cash books, ledgers, journals and other account books of the corporation covering a period of fifteen months." *Oklahoma Press, supra*, 327 U.S. at 207-208, 66 S. Ct. at 504-505, n.40. Similarly, in *Brown v. United*

States, 276 U.S. 134, 48 S. Ct. 288, 290, 7 L. Ed. 500 (1928), a subpoena was deemed reasonable which called for

> all letters, telegrams or copies thereof passing between a national trade association and its members, including their officers and agents, over a period of two and one-half years, with reference to eighteen different items.

Id. (quoting *Brown*, *supra*, 276 U.S. 134, 48 S. Ct. 288, 290). The subpoena was deemed reasonable because it was limited to a reasonable period of time and specified " 'with reasonable particularity the subjects to which the documents called for were to relate.' " *Id.*

In the matter *sub judice*, however, the State wanted all of Roe Corporation's records, without limitation of any kind whatsoever, from the date of Roe's inception, eighteen years ago, to the present. In addition, the State wanted Doe and Roe to answer some 291 questions concerning many matters that are alleged to have taken place more than ten years ago. These unrestricted demands for information were no different than the request in *Federal Trade Commission*, *supra*, that was deemed violative of the Fourth Amendment and the "first principles of justice."

The Petitioners vigorously argued, among other things, that the investigation was violative of their Fourth and Fifth Amendment right to a zone of privacy free from governmental intrusion on the basis that the specific search being conducted under N.J.S.A. 2C:41-5 was too sweeping and indefinite in violation of the parameters set forth in the above case law. (pp. 35a-46a). Notwithstanding *Federal Trade Commission*'s requirements that "some ground . . . be shown for supposing that the documents called for do contain [evidence] . . . [that]

[s]ome evidence of the materiality of the papers demanded . . . be produced[ ]" at 264 U.S. 306, 44 S. Ct. at 337 (citations omitted), the New Jersey Courts upheld the State's inspection of all of Roe's corporate records from the date of its incorporation in 1978 until the present, merely on the state's assertion that it suspected Doe and Roe of being controlled and financed by organized crime.

The trial court did not find the current investigation unreasonable even though, in effect, the best the State could offer for a justification was that it wanted the information it sought, and could not specify why or how the information demanded was relevant to the investigation because it had no way of knowing which information was relevant until after the information had been provided. (Pa 51-54). Clearly the trial court failed to require strict compliance with N.J.S.A. 2C:41-5 and the Investigative Interrogatories here constituted an unreasonable search into Petitioners' private affairs in violation of the Fourth, Fifth, Ninth, and Fourteenth Amendments. *See Griswald v. State of Connecticut*, 381 U.S. 479, 85 S. Ct. 1678 (1965).

The statutory authorization to propound Investigative Interrogatories must be deemed unconstitutional as it permits the State to invade private rights without the judiciary necessarily ever intervening. On this point, Justice Murphy, dissenting in *Oklahoma Press*, succinctly stated the danger inherent in such a delegation:

> Perhaps we are too far removed from the experiences of the past to appreciate fully the consequences that may result from an irresponsible though well meaning use of the subpoena power. To allow a non-judicial officer, unarmed with judicial process, to demand the books and papers of an individual is an

> open invitation to abuse of that power. It is no answer that the individual may refuse to produce the material demanded. Many persons have yielded solely because of the air of authority with which the demand is made, a demand that cannot be enforced without subsequent judicial aid. Many invasions of private rights thus occur without the restraining hand of the judiciary ever intervening.
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> * * *
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> Only by confining the subpoena power exclusively to the judiciary can there be any insurance against this corrosion of liberty.

Oklahoma Press Publishing Co., supra, 327 U.S. at 218-219, 66 S. Ct. at 510 (J. Murphy dissenting).

Indeed, the trial court raised this very issue when reviewing the instructional cover sheet sent by the Attorney General with the Investigative Interrogatories. (pp. 143a-146a). The Court was alarmed that the State should instruct a witness to appear at the Attorney General's Office to furnish testimony. (p. 32a). The State's response was that it doesn't normally compel appearance; it only expects to receive the material it demands. (*Id.*). The Court correctly pointed out that a citizen getting the Investigative Interrogatory which John Doe and Roe Corporation received would not derive this meaning from the cover sheet. (p. 56a). However, the Court did not address this issue in its Opinion, leaving the Attorney General free in the future to attempt to obtain evidence in an impermissible manner without the judiciary necessarily ever intervening.

CONCLUSION

In the instant matter, the Attorney General clearly failed to establish an adequate basis for investigating Doe and Roe under N.J.S.A. 2C:41-5. Moreover, the New Jersey Courts failed to require strict compliance with the statute and failed to protect the Petitioners' constitutional rights. As exemplified by the New Jersey Court proceedings, courts will inevitably be inclined to permit infringement of witness's constitutional rights when legislatures delegate to the executive branch the investigatory techniques allowed by N.J.S.A. 2C:41-5.

Petitioners respectfully submit that this matter involves violations of rights guaranteed by the United States Constitution, and concerns matters of general public importance which should be addressed by the Supreme Court. As such, the Petitioners respectfully request this Court to issue a writ of certiorari to the Appellate Division of the Superior Court of the State of New Jersey.

Respectfully submitted,

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